COMPENSATION REVIEW BOARD

CRB No. 11-148

QUINTON G. BRISCOE
Claimant–Respondent,

v.

POTOMAC ELECTRIC POWER COMPANY,
Self-Insured Employer-Petitioner.

An Appeal from a November 28, 2011 Compensation Order on Remand of
Administrative Law Judge Anand K. Verma
OHA No. 06-313, OWC No. 614189

W. Scott Funger, Esquire, for the Claimant
Kevin J. O'Connell, Esquire, for the Employer

Before HEATHER C. LESLIE, JEFFREY P. RUSSELL, and HENRY MCCOY, *Administrative Appeals Judges*.

HEATHER C. LESLIE, *Administrative Appeals Judge*, for the Compensation Review Board.

DECISION AND REMAND ORDER

OVERVIEW

This case is before the Compensation Review Board (CRB) on the request for review filed by the Claimant - Petitioner (Claimant) of the November 28, 2011, Compensation Order on Remand (COR) issued by an Administrative Law Judge (ALJ) in the Hearings and Adjudication section of the District of Columbia Department of Employment Services (DOES). In that COR, the ALJ denied the Claimant's request for a closed period of temporary total disability benefits and permanent partial disability benefits his left leg. We VACATE AND REMAND.

BACKGROUND AND FACTS OF RECORD

The Claimant worked as a cable splice mechanic for the Employer. On March 16, 2005, the Claimant injured his left knee. The Claimant underwent conservative treatment for a period of time after the injury. Eventually, the Claimant was advised to undergo surgery, which the

Claimant declined. The Claimant was ultimately declared to be at maximum medical improvement.

The Claimant sought an award of permanent partial disability benefits for the left leg at a Formal Hearing on September 14, 2006. At that hearing, the ALJ, due to perceived time constraints, did not allow the Employer to present the testimony of its witness, Mr. Carl Anglin. The ALJ subsequently awarded the Claimant 15% permanent partial disability of the left leg.[1] In the CO, the ALJ found the Claimant credible and credited his testimony that he was unable to perform some of the physical requirements of his job as a result of his injury.[2]

The Employer timely appealed arguing that the ALJ failed to adequately consider its defense to the claim by not considering the lack of any negative effect of the injury upon Claimant's earnings, and that the ALJ impermissibly refused to permit the Employer to adduce additional evidence in the form of testimony from Mr. Anglin and two post-hearing medical reports which address Respondent's capacity to perform that job. The CRB, in an Order dated June 19, 2009, found that the ALJ was in error by not permitting the testimony of Mr. Anglin but that error was harmless.[3] The CRB also found that the Employer had failed to show any unusual circumstance that would warrant the submission of the post hearing medical reports. However, the CRB found that CO was ambiguous as to what legal analysis was used in awarding the disability benefits, and remanded the case back to the ALJ to identify the legal standard used and the record evidence supporting that award.

A Compensation Order on Remand (COR1) was issued on July 31, 2007.[4] The CO again granted the Claimant's claim for relief. The Employer appealed the COR1 to the CRB alleging the ALJ failed to follow the dictates of the CRB's earlier remand. Specifically, the Employer argued the ALJ failed to consider the vocational impact of the medical impairment on the knee nor did the ALJ identify or discuss which record evidence was considered in making an award under the applicable standard. The CRB recognized that the ALJ set forth the correct legal standard as enunciated in *Wormack v. Fishbach and Moore*, CRB (Dir. Dkt.) No. 03-159, OWC No. 564205 (July 2, 2005) and in *Neguisse v. DOES*, 915 A.2d 391 (D.C. 2007) for making schedule awards in this jurisdiction. However, as the CRB stated,

> The ALJ in making the schedule award, cited the American Medical Association (AMA) Guides as his basis. This was an error as a matter of law. As *Wormack* and *Neguisse* indicate, the AMA Guides reflect a medical concept or impairment only; it is the province of the ALJ to determine the rate of *disability* awardable pursuant to D.C. Official Code § 32-1508(3) in light of the evidence presented in this case. Therefore, a remand is necessary to correct the Conclusions of Law in

[1] *Briscoe v. Potomac Electric Power Company*, AHD No. 06-313, OWC No. 614189 (April 12, 2007).

[2] *Id*. at 4.

[3] *Briscoe v. Potomac Electric Power Company*, CRB. No. 01-102, AHD No. 06-313, OWC No. 614189 (June 19, 2007).

[4] *Briscoe v. Potomac Electric Power Company*, AHD No. 06-313, OWC No. 614189 (July 31, 2007).

> the Compensation Order on Remand so that it conforms to the law in this jurisdiction.[5]

On November 14, 2007, a Compensation Order on Remand (COR2) was issued.[6] The Claimant was again awarded 15% permanent partial disability to the left leg. This time in the conclusion of law section of the COR2, the ALJ granted the Claimant's request in accordance with the provisions of D.C. Code, as amended, §32-1508(3).

The Employer appealed a third time to the CRB which affirmed the November 4, 2007 COR2 on March 5, 2008.[7] The Employer then appealed to the District of Columbia Court of Appeals (DCCA).

On August 31, 2009, the DCCA issued a decision, vacating and remanding the CRB decision of March 5, 2008 holding that the ALJ erred (1) by not admitting into the record the testimony of Respondent's supervisor, Carl Anglin; (2) by not ruling upon the Employer's motion to re-open the record and determine whether to admit or exclude two medical reports from Dr. Christina Cervieri; and (3) by not articulating any basis for the permanent partial disability determination other than medical grounds, in disregard of case authority holding that schedule awards pursuant to D.C. Official Code § 32-1508(3). The CRB remanded the case to Hearings and Adjudications on September 15, 2009, quoting *Negussie*[8] *and Corrigan v. Georgetown University.*[9] The CRB stated,

> Consistent with the Memorandum Opinion and Judgment of the District of Columbia Court of Appeals entered with respect to this matter on August 31, 2009, it is hereby ORDERED that this case be REMANDED to AHD for reconsideration following reopening of the evidentiary record to permit Anglin's testimony, for a determination with regard to admitting or excluding Dr. Cervieri's September 2006 medical reports, for articulation of the non-medical factors that support the award if the ALJ still determines that Briscoe is entitled to benefits, and for such further proceedings as AHD deems necessary in light of the Court's Opinion.[10]

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[5] *Briscoe v. Potomac Electric Power Company*, CRB No. 07-156, AHD No. 06-313, OWC No. 614189 (November 8, 2007).

[6] *Briscoe v. Potomac Electric Power Company,* AHD No. 06-313, OWC No. 614189 (November 14, 2007).

[7] *Briscoe v. Potomac Electric Power Company*, CRB No. 08-057, AHD No. 06-313, OWC No. 614189 (March 8, 2008).

[8] 915 A.2d 391, 397 (D.C. 2007).

[9] CRB No. 06-094, AHD No. 06-256 (September 14, 2007).

[10] *Briscoe v. Potomac Electric Power Company,* CRB No. 08-057(R), AHD No. 06-313, OWC No. 614189 (September 15, 2009).

On January 10, 2010, a hearing was held solely to allow the testimony of Mr. Anglin pursuant to the DCCA's instructions. On February 17, 2010, a Compensation Order on Remand (COR3) was issued.[11] The ALJ allowed the submission of the two medical reports at issue in the prior appeals, quoting 7 DCMR §223.4. After reviewing the additional evidence and testimony, the ALJ ultimately concluded that,

> Inasmuch as claimant takes no prescribed medications daily or undergoes any therapy or treatment to ameliorate the distressed knee, which has otherwise not impeded his ability to work and earn the same or higher wages in the post-injury employment, his entitlement to the permanent partial disability benefits cannot be sustained.[12]

The ALJ denied the Claimant's claim for relief resulting in the Claimant's appeal. On November 9, 2011, the CRB issued a Decision and Remand Order directing the ALJ to do the following:

1. Clarify what reasonable grounds or unusual circumstances he found to allow the medical reports to come into evidence.
2. Reconsider the Claimant's request for permanent partial disability benefits without any consideration of wage loss. (Footnote omitted)
3. Reconcile all of the findings of facts in the compensation orders all of which have been adopted an incorporated in their entirety.[13]

On November 28, 2011 a Compensation Order on Remand was issued (COR4).[14] In COR4, the ALJ incorporated the findings of facts made in the April 13 and July 31, 2007 Compensation Orders as well as a Compensation Order on Remand. The ALJ also, relying again on 7 DCMR §223.4, granted the Employer's post hearing motion and admitted the medical reports generated after the hearing. The ALJ denied the Claimant's request for disability benefits again, based in part on the post hearing medical reports submitted by the Employer.

The Claimant timely appealed. The Claimant argues the ALJ erred (1) failing to clarify what reasonable grounds or unusual circumstances allowed the medical reports to come into evidence, (2) by improperly considering wage loss when denying the permanency award, and (3) by failing to reconcile all of the findings of facts in the compensation orders all of which have been adopted. The Employer argues the ALJ's acceptance of the post hearing medical reports was not in error and the COR4 is supported by the substantial evidence in the record and the legal conclusions drawn from the facts are in accordance with the applicable law.

THE STANDARD OF REVIEW

[11] *Briscoe v. Potomac Electric Power Company,* AHD No. 06-313, OWC No. 614189 (February 17, 2010).

[12] *Id.* at 6.

[13] *Briscoe v. Potomac Electric Power Company*, CRB No. 10-069, AHD No. 06-313, OWC No. 614189 (November 14, 2011).

[14] *Briscoe v. Potomac Electric Power Company*, AHD No. 06-313, OWC No. 614189 (November 28, 2011).

The scope of review by the CRB is limited to making a determination as to whether the factual findings of the Compensation Order are based upon substantial evidence in the record, and whether the legal conclusions drawn from those facts are in accordance with applicable law. S*ee* District of Columbia Workers' Compensation Act of 1979, D.C. Code, as amended, §32-1501 *et seq*., at §32-1521.01(d)(2)(A) of the ("Act") and *Marriott International v. DOES,* 834 A.2d 882 (D.C. 2003).

Consistent with this standard of review, the CRB must uphold a Compensation Order that is supported by substantial evidence, even if there is substantial evidence in the record to support a contrary conclusion, and even where the CRB might have reached a contrary conclusion. *Id*. at 885.

DISCUSSION AND ANALYSIS

The Claimant first argues that the ALJ failed to identify any reasonable grounds or unusual circumstances which would warrant the record being re-opened for the receipt of the additional medical records. We agree.

A review of the COR4 reveals the ALJ, again relying on 7 DCMR §223.4[15], states that the additional evidence was admitted pursuant to the DCCA's instructions. The ALJ continued,

> Dr. Cervieri's medical report, even though authored on September 19, 2006, some five days after the September 14, 2006 Formal Hearing was not available to employer at the time of hearing. Because of its materiality to the resolution of the contested issue of claimant's capacity to return to his pre-injury employment, this additional evidence was admitted over claimant's objection.

COR4 at 4.

No further findings were made, including what reasonable grounds or unusual circumstances would warrant the re-opening of the record after the formal hearing. We again remind the ALJ of our prior discussion,

> It is well settled, in order to succeed in reopening the record, the moving party must first satisfy the requirements outlined in D.C. Code §32-1520(c) which states, in relevant part, "no additional information shall be submitted by the claimant or other interested parties after the date of hearing, except under unusual circumstances as determined by the Mayor."
>
> In tandem with the above statute, 7 DCMR §264.1(a)(b), dealing with the submission of additional evidence, states,
>
> > Where a party requests leave to adduce additional evidence the party must establish: (a) that the additional evidence is material, and (b) that there existed reasonable grounds for the failure to

[15] 7 DCMR §223.4 states,

> If the Hearing or Attorney Examiner believes that there is relevant and material evidence available which has not been presented at the formal hearing, the Hearing or Attorney Examiner may order the parties to acquire and submit the evidence. The Hearing or Attorney Examiner may also continue the hearing to allow the parties to develop the evidence or, at any time prior to the filing of the compensation order, reopen for receipt of the evidence.

> present the evidence while the case was before the Administrative Hearings Division or the Office of Workers' Compensation (depending on which authority issues the Compensation order from which appeal was taken).
>
> Thus, a moving party must show the evidence is relevant and there were reasonable grounds for the failure to submit, such as unusual circumstances, the evidence at the Formal Hearing to re-open the record.
>
> While it is within the ALJ's discretion to admit post-hearing evidence, the ALJ must follow the dictates of the statute and regulations and enunciate not only that the evidence is relevant and material but also that there were reasonable grounds for the failure to submit the evidence at the Formal Hearing. The ALJ did find the evidence material and relevant, a finding we will not disturb. However, we cannot discern what unusual circumstance or reasonable ground for the failure to adduce the evidence prior to the hearing the ALJ relied upon to justify the re-opening of the record.
>
> The ALJ seems to acknowledge that the evidence was only available after the formal hearing. The Employer argues that Dr. Cervieri's generation of a report after the hearing which releases the Claimant to full duty is indeed an unusual circumstance that warrants re-opening of the record. We cannot agree, as it is not an unusual event for Claimant to seek treatment after a Formal Hearing for ongoing symptoms, even if the Claimant has obtained maximum medical improvement from his or her injuries. It is also not unreasonable for a physician to release a Claimant to full duty, at the Claimant's request, as happened here after the Employer expressed concerns in light of his testimony.
>
> We are, unfortunately, constrained to remand the re-opening of the record, to the ALJ for clarification on what reasonable grounds or unusual circumstances he found to allow the medical reports to come into evidence.[16]

We also point out that while prior panels had found no unreasonable circumstances existed for the re-opening of the record, the Court of Appeals took exception to the CRB's findings and specifically remanded the case for the *ALJ* to determine what, if any, unusual circumstances occurred. The DCCA stated,

> Pepco wanted to submit these reports after the hearing because "they were not available at the time of the formal hearing." Pepco also stated that the reports "are relevant to the issues that are the subject of this claim because they address claimant's ability to perform the job duties to which he is assigned." In response to Pepco's motion, the ALJ did nothing. He eventually issued his first CO and the CRB interpreted this issuance as an implicit denial of Pepco's motion. According to the CRB, Pepco had not provided an adequate showing of "unusual circumstances" that would justify reopening the record under D.C. Code § 32-1520 (c).

[16] *Briscoe v. Potomac Electric Power Company* , CRB No. 10-069, AHD No. 06-313, OWC No. 614189 (November 14, 2011) at 5-6.

> *We do not know whether the ALJ even considered whether Pepco demonstrated the necessary "unusual circumstances" because he never ruled on Pepco's motion to reopen the record.* Although an ALJ has discretion to decide whether or not to reopen the record, "an agency must cogently explain why it has exercised its discretion in a given manner." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 48 (1983) (citations omitted). The ALJ in this case failed to provide any explanation of his apparent decision to ignore the motion and this failure was itself an abuse of discretion. As we have stated, "[f]ailure to exercise choice in a situation calling for choice is an abuse of discretion -- whether the cause is ignorance of the right to exercise choice or mere intransigence -- because it assumes the existence of a rule that admits of but one answer to the question presented." *Johnson v. United States,* 398 A.2d 354, 363 (D.C. 1979); *accord, Stowell v. District of Columbia Dep't of Transp.,* 514 A.2d 438, 445 (D.C. 1986). (Emphasis added).[17]

We again are forced to remand the case back to the ALJ to determine, pursuant to the prior decision and remand orders as well as the District of Columbia Court of Appeals (DCCA) opinion , what reasonable grounds or unusual circumstances are present which would allow the submission of medical reports after the record has closed.

The Claimant next argues the ALJ impermissibly considered wage loss when denying an award of permanent partial disability for his left leg. Prior to addressing this argument, we note initially that during the pendency of this appeal, the DCCA issued its decision in *Jones v. DOES*, 41 A.3rd 1219 (D.C. 2012) (*Jones*). In *Jones*, the DCCA wrote as follows:

> We can agree with the basic premise expressed by the CRB that the determination of disability is not an exact science, and that it necessarily involves a certain amount of "prediction," in making a schedule award [. . .]. But whether or not the measure for such a disability award, expressed by the statute in terms of weeks of pay [. . .] may be described as "arbitrary," it cannot be countenanced that the ALJ's decision-making itself can be arbitrary [ftnt. 4 omitted]. There is a qualitative difference between recognizing that in making a legal determination of disability, the ALJ comes to a conclusion based on a complex of factors, taking into account physical impairment and potential for future wage loss, and the application of judgment based on logic, experience and even "prediction," and considering that any disability determination by the ALJ, once made, is impermeable to review. We cannot accept "the predictive nature of the judgment 'as though it were a talisman under which any agency decision is by definition unimpeachable'". *Int'l. Ladies Garment Workers' Union v. Donovan, 722 F.2d 795, 821, 232 U.S. App. D.C. 309 (D.C. Cir. 1983)* (quoting *Motor Vehicle Mfrs. Ass'n, Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 50, 103 S. Ct. 2856, 77 L. Ed. 2d 443 (1983)).*
>
> In this case, we know that the ALJ resolved the conflict between the two doctors and found that petitioner had suffered a permanent impairment to her left leg of

[17] *Briscoe v. Potomac Electric Power Company* , No. 08-AA-344, AHD No. 06-313, OWC No. 614189 (August 31, 2009).

> 6%. We also know that the ALJ was properly aware that the disability determination was not the same as physical impairment, and required a determination of economic wage loss. *Washington Post Co.[v. DOES], 675 A.2d [37] at 40* (quoting *American Mut. Ins. Co. v. Jones, 426 F.2d 1263, 1265, 138 U.S. App. D.C. 269 (D.C. Cir. 1970))*.
>
> There is evidence in the record that petitioner established such a loss because she could not perform her part-time work. [ftnt. 7, to be quoted *post*]. Petitioner claims that her impairment restricted her to sedentary work, resulting in an economic impairment in excess of 20% [ftnt. 8 omitted]. The ALJ stated in conclusory terms, with apparent contradiction, that, "In consideration of the evidence in the record as detailed above, and *setting aside any consideration of wage loss but presuming an effect on [c]laimant's wage earning capacity,* [c]laimant qualifies for a 7% permanent partial disability award for her left leg disability." How the ALJ determined that the disability award should be 7% -- and not, for example, 1%, 10% or 30% -- is a complete mystery, however.
>
> On this record, therefore, we are unable to affirm the CRB's conclusions that the ALJ's determination flowed rationally from the factual findings, and that the ALJ in fact applied the law taking into account the entirety of the record. We remand this case so that the agency can, in further proceedings, make such additional findings of fact and reasoned conclusions of law, as will support the determination of the disability award.
>
> *Id.*, 1224 and 1226 (emphasis in original).
>
> Footnote 7 reads as follows:
>
> Although neither the ALJ nor the parties have referred to the relative amount petitioner received from her full-time and part-time employment, we note there are documents in the record (one from employer's counsel) that petitioner's part-time work comprised approximately 20% of her overall earnings.
>
> *Id.*

From this language in *Jones,* coupled with the court's command that consideration of a schedule award "tak[e] into account the entirety of the record", it is clear that the court finds it appropriate to consider the effect of the injury on a claimant's actual earnings, where the record contains such evidence. Thus, the Claimant's argument is rejected. Upon remand, the ALJ is to determine the Claimant's entitlement to permanent partial disability, if any, pursuant to the rationale outlined in *Jones.*

However, we cannot determine ultimately if the ALJ's denial of the Claimant's claim for relief is supported by the substantial evidence in the record and in accord with *Jones*, first, because until the ALJ properly rules upon the Motion to Re-open the Record, as discussed above, we cannot determine if the consideration of the medical reports is in error. Second, the ALJ failed to reconcile the findings of fact and conclusions of law in the prior orders. Indeed, in the order

before us, the ALJ seems to adopt findings of fact in only one Compensation Order on Remand, when there have been several. As we pointed out in our prior decision,

> Finally, the ALJ seems to indicate that because the Claimant is not currently taking any medication or undergoing any treatment, this is further evidence that a scheduled award is not proper. This is in error. Simply because an individual is not undergoing active treatment after having been declared to be at maximum medical improvement, does not mean there are not any residual effects casuing disability. As the ALJ noted in the initial Compensation Order of April 12, 2007 the Claimant credibly testified to his current symptoms, that of his knee joints numbing and tightening up. We caution the ALJ, upon remand, to reconcile all of the findings of facts in the compensation orders, all of which have been adopted and incorporated in their entirety.[18]

As we have stated in a situation very similar to the case at bar,

> We urge the ALJ to begin with a clean slate, and we direct that all findings of fact upon which the ALJ bases the decision be explicitly set forth in the Compensation Order on Remand, and that the record evidence upon which they are based be specifically identified, not by incorporation but by specific identification by exhibit number, and/or hearing transcript page.[19]

We again direct the ALJ to reconcile all of the findings of facts in the compensation orders, all of which have been adopted and incorporated in their entirety.

[18] *Briscoe v. Potomac Electric Power Company*, CRB No. 10-069, AHD No. 06-313, OWC No. 614189 (November 14, 2011).

[19] *Hill v. Howard University*, CRB No. 12-180, AHD No. 10-117A (March 27, 2013).

CONCLUSION

Upon remand, the ALJ is directed to,

1. Clarify what reasonable grounds or unusual circumstances he found to allow the medical reports to come into evidence.
2. Reconsider the Claimant's request for permanent partial disability, if any, pursuant to the rationale outlined in *Jones*.
3. Reconcile all of the findings of facts in the compensation orders all of which have been adopted and incorporated in their entirety

ORDER

The November 28, 2011 Compensation Order on Remand is not supported by the substantial evidence in the record and is not in accordance with the law. The Compensation Order is VACATED and REMANDED.

FOR THE COMPENSATION REVIEW BOARD:

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HEATHER C. LESLIE
Administrative Appeals Judge

May 7, 2013
DATE